84-1318(1)

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No. .....

In the

Supreme Court of the United States

OCTOBER TERM 1984

PIPELINE LOCAL UNION NO. 38
AFFILIATED WITH THE
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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I.

QUESTIONS PRESENTED

(1) Whether the gross pay judgment the discriminatees received below was contrary to established law where it more than made the discriminatee whole because it included expenses for food, lodging and transportation each discriminatee would necessarily have expended on each job as a pipeline laborer.

(2) Whether discriminatee M. D. Cook is entitled to back pay where he absolutely refused to accept any job referrals from Petitioner Pipeline Local 38.

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JURISDICTIONAL STATEMENT

INTRODUCTION

Pipeline Local Union No. 38, Appellant, appeals from the judgment of the Court of Appeals for the 5th Circuit dated December 17, 1984, and from its subsequent modification entered January 7, 1985. That final judgment enforced with modification the order of the National Labor Relations Board entered October 26, 1983, which denied Petitioner's appeal to set aside the decision of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is No. 84-4035 of the Fifth Circuit Court of Appeals decided December 17, 1984, and cited as 748 F.2d 1001. Judgment was modified on January 7, 1985, (Appendix B). The Order and Judgment of the National Labor Relations Board is dated October 26, 1983, and cited as 268 NLRB 18 (1983). (Appendix C).

JURISDICTION

The Judgment of the Court of Appeals was entered on January 7, 1985. This appeal is being docketed in this court within ninety (90) days from the final judgment. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 29 U.S.C. 160(c) (e) (f).

QUESTIONS PRESENTED

(1) Whether the gross pay judgment the discriminatees received below was contrary to established law where it more than made the discriminatee whole because it included expenses for food, lodging and transportation each discriminatee would necessarily have expended on each job as a pipeline laborer.

(2) Whether discriminatee M. D. Cook is entitled to back pay where he absolutely refused to accept any job referrals from Petitioner Pipeline Local 38.

STATUTES INVOLVED

This case involves the application of the National Labor Relations Act and in particular 29 U.S.C. § 160(a). This is presented separately as Appendix D to this Petition.

RAISING THE FEDERAL QUESTION

Appellant, Pipeline Local Union No. 38, raised the questions presented here at all levels of the proceeding; first before the Administrative Law Judge, then by appeal to the National Labor Relations Board and again in appeal to the Court of Appeals for the 5th Circuit in 748 F.2d 1001. Appellant's claim that the monetary judgment found for the discriminatees represented a windfall profit; and was against established law was raised when evidence was presented into the record. Pipeline Local Union No. 38 also raised the issue that discriminatee, M. D. Cook, was not entitled to back pay because he absolutely refused to accept job referrals from Pipeline Local No. 38. The Court of Appeals for the 5th Circuit overruled the renewed objection and upheld the decision of the National Labor Relations Board.

STATEMENT OF THE CASE

Petitioner Pipeline Local Union No. 38 affiliated with the Laborers' International Union of North America, AFL-CIO is a "labor organization" within the meaning of 29 U.S.C. 152(5). The National Labor Relations Board and the Fifth Circuit Court of Appeals has found that Petitioner discriminated against four discriminatees and awarded them a money judgment for back wages, welfare and pension benefits.

The Fifth Circuit Court of Appeals and the National Labor Relations Board rejected the evidence and argument of the Pipeline Local Union No. 38 that the amounts of money so found represented a windfall profit to the discriminatees in that as a necessary part of the job of pipeline laborer, each discriminatee would have necessarily incurred certain board, lodging and transportation expense that were properly deductible from gross income they would earn on a job. Pipeline laborers, working in the jurisdiction of the Pipeline Local No. 38 cover the geographical area of the State of Texas and the western half of the State of New Mexico. Thus, in order to man the job, pipeline laborers must physically relocate on the job sites as they occur and, as the uncontroverted testimony showed, each is entitled to certain tax deductions from gross wages to determine the net amount of taxable income. The gross wages awarded below substantially exceed the discriminatees' net wages and thereby are more than a make whole remedy.

The Fifth Circuit Court of Appeals and the NLRB also rejected the argument of Petitioner that discriminatee M. D. Cook should be denied back wages, for the reason that he unequivocally refused to be available to work referrals by Pipeline Local No. 38. The Board held, and the Fifth Circuit upheld, the finding that there was nothing Pipeline Local No. 38 could do that would have limited back pay liability so long as the Chief Executive officer of Pipeline Local No. 38 was the same person (even though democratically elected) who had been the cause of the unfair labor practices in the underlying case. The record shows that discriminatee Cook was unwilling, under any and all circumstances to go to work on any job referral by Pipeline Union Local No. 38.

THE QUESTION IS SUBSTANTIAL

This novel issue is substantial and should be considered by the court as a matter of clarification of this court's prior holding that discriminatees should be made "whole". Reasonable courts have differed on the interpretation of "whole" which oftentime results in an inequitable judgment.

Question 1 — Restated

Whether the gross pay judgment the discriminatees received below was contrary to established law where it more than made the discriminatee whole because it included expenses for food, lodging and transportation each discriminatee would necessarily have expended on each job as a pipeline laborer.

This Court has previously held, with regard to an employee who became an independent contractor, that he was entitled to a remedy based upon net "profits after deduction of their operating expenses". *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 38 L.Ed.2d 388, 94 S.Ct. 414, 84 LRRM 2839 (1973). Petitioner respectfully suggests that where, as here, the board, lodging and transportation expenses that Petitioner seeks credit for are an integral and necessary part of the performance of the job, that this Court should hold that they should be deducted before the determination of the back wages that discriminatees should receive. This fact situation differs from the fact situation in *NLRB v. Gullet Gin Co.*, 340 U.S. 361, 71 S.Ct. 337, 95 L.Ed.2d 377, 27 LRRM 2230 (1951) and *NLRB v. East Texas Steel Castings*, 255 F.2d 285 (5th Cir. 1958). Here the expenses for which credit is sought are an integral part of the job (See footnote 1 in Appendix A). The discriminatees should receive the same amount of money that they would have realized from their labor but

for the discrimination. Since the board, lodging and transportation expenses were inherent to the job and thus would not have been realized by the discriminatees; that the decision of the 5th Circuit should be reformed or remanded for further information to determine the adjusted gross income of the discriminatees to determine the proper back wages. Petitioner asserts that by deducting those necessary expenses, they would restore the economic status quo that would have been maintained but for the discrimination found in the underlying case, and that that would be the proper "make whole remedy" as contemplated by *Republic Steel v. NLRB*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6, 7 LRRM 287 (1940).

Question 2 — Restated

Whether discriminatee M. D. Cook is entitled to back pay where he absolutely refused to accept any job referrals from Petitioner Pipeline Local 38.

Discriminatee Cook was found by the tryer of fact to have refused to accept referrals from Local 38 during the entire back pay period. Mr. Cook stated at the trial that he would not accept work from the Union under any circumstances after August, 1978. Additionally, he would not even let the Union know his address and telephone number. Since the discriminatee refused to cooperate with the Union in referrals to jobs under any circumstances, the Local should be relieved of any obligation in back pay *Kenston Trucking Company v. NLRB*, 544 F.2d 1165, 93 LRRM 2838 (2d Cir. 1976), *Lewis v. NLRB*, 681 F.2d 1154, 110 LRRM 3280 (9th Cir. 1981). Cook earned virtually nothing for four years and refused to cooperate with the Petitioner herein with regard to work on the pipeline. In *NLRB v. Madison Courier, Inc.*, 505 F.2d 391, (D.C. Cir. 1974) the

Court held that an employee is required to make a reasonable effort to locate suitable interim work based upon background and experience and the wages and conditions of his regular job. Here, the source of work referrals, the Union Hall, was unable to even communicate with Mr. Cook because of his adamant refusal to cooperate, and for that reason back pay liability should have been terminated as of August, 1978. See also *Carruthers Ready Mix, Inc.*, 262 NLRB 739, 110 LRRM 1392 (1982) and *Burnip and Sims*, 256 NLRB 965, 107 LRRM 1402 (1981).

CONCLUSION

For these reasons it is respectfully requested that the court should note probable jurisdiction of this appeal, should permit the parties to fully brief and argue the issue and should resolve the conflicting interpretation of the meaning of the word "whole" as related to compensation for past injustices.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 14 day of February 1985, three copies of this Jurisdictional Statement were mailed, by first class mail, postage prepaid, to William Wachter and Joseph A. Oertel, National Labor Relations Board, Office of the General Counsel, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570, counsel for Respondent. Copies were also sent to Mr. Michael Dunn, National Labor Relations Board — Region 16, Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102; to Jerry Ryan, counsel for Mac Westmoreland at Shaw & Shaw, Post Office Box 27, Mena, Arkansas 71953; to Don Hinds, counsel for M. D. Cook at Shahan & Snyder, 2909 Cole Avenue, Suite 100, Dallas, Texas 75204; to Alvin Stewart, 403 East Ross, DeLeon, Texas 76444; and, to Thomas H. Mitchell, 79 Katie Lane, Midland, Texas 78701. I further certify that all other parts required to be served have been served.

MARVIN MENAKER

APPENDIX A

No. 84-4035

748 F.2d 1001

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO; and Pipeline Local Union No. 38, Affiliated With the Laborers' International Union of North America, AFL-CIO,

Respondents.

United States Court of Appeals,
Fifth Circuit.

Dec. 17, 1984.

General counsel petitioned to enforce back-pay specification order made in prior case in which it was determined that unions had violated National Labor Relations Act sections by causing a discharge and discriminatorily refusing to refer union members pursuant to hiring hall arrangement. The Court of Appeals, Garza, Circuit Judge, held that: (1) National Labor Relations Board was not obligated to allow deduction from back-pay award for any transportation, lodging, and food expenses saved by discriminatees during period covered by award; (2) Board did not act arbitrarily in basing back-pay awards on hours worked in prior years by individual discriminatees rather than hours worked by an average laborer in the hiring hall; (3) Board had a rational basis for its choice of base years used in determining amount of back pay; (4) discriminatees took reasonable steps to mitigate back pay which would eventually be due them; but (5) order would be modified with regard to

medical expenses incurred by discriminatees during backpay period.

Ordered accordingly.

Application for Enforcement of an Order of the National Labor Relations Board.

Before GARZA, REAVLEY and JOHNSON, Circuit Judges.

GARZA, Circuit Judge:

In an earlier proceeding in this case, the National Labor Relations Board found that the respondent Pipeline Local 38 ("Local") had violated Section 8(b) (2) of the National Labor Relations Act, 29 U.S.C. 158(b) (2), by causing the discharge of employee Mac Westmoreland. Local 38 was also found to have violated Section 8(b) (1) (A), 29 U.S.C. 158(b) (1) (A), by discriminatorily refusing to refer Local 38 members Millard Dale Cook, Tom Mitchell, Alvin Stewart, and Westmoreland ("discriminatees") pursuant to a hiring hall arrangement. In that same proceeding, the respondent Laborers' International Union ("International") was found to have violated Section 8(b) (1) (A) with respect to Mitchell and Stewart during the period in which the Local was under the trusteeship of the International. This order was enforced by the United States Court of Appeals for the District of Columbia Circuit. 673 F.2d 552 (1981).

The case returned to the Board for a determination as to what amount of backpay would be appropriate for each discriminatee pursuant to 29 C.F.R. §§ 102.52-102.59 (1983). The General Counsel is now petitioning this court to enforce the resultant backpay specification order.

I.

The facts of this case are discussed in the two earlier Board proceedings, 247 NLRB 1250 (1980) and 268 NLRB 18 (1983), and need not to be restated in detail here. Briefly, in October, 1976, the International placed the Local under

trusteeship and appointed David Solly acting business manager. In May, 1977, Solly was elected business manager and the trusteeship ended.

As found by the Board in the underlying case and affirmed by the United States Court of Appeals for the District of Columbia Circuit, Solly's tenure from its onset was characterized by his attempts to intimidate and retaliate against anyone who opposed him politically in the Local. The Board further found Solly's attitude had manifested itself as physical violence against Cook and Stewart and as discriminatory referrals against all four discriminatees. These actions resulted in the Board's finding the violations of the Act outlined above. Accordingly, the Board ordered backpay jointly and severally from the Local and International during the period of the trusteeship, and against the Local alone for the later period.

The sole issue before the Board, and now this court, in this second proceeding is the appropriate amount of backpay due the discriminatees.

II.

The respondents first maintain that the Board erred in failing to allow a deduction from the backpay award for the transportation, lodging, and food expenses that the discriminatees would necessarily have paid out of their wages on a job site.[1] They argue that this unadjusted backpay award gives the discriminatees a windfall and, in effect, punishes the respondents.

[1] It is true that the purpose of a backpay award is to make an employee whole rather than to punish an employer or labor organization. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12, 61 S.Ct. 77, 79, 85 L.Ed. 6 (1940). However,

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[1]The respondents maintain that these expenses can range from twenty-five to more than fifty percent of a pipeline laborer's total wages. For the purpose of this opinion, we may assume that those figures are reasonable estimates of the amounts involved.

the Board has broad discretion in fashioning relief, and that discretion will not be overturned by a reviewing court "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Company v. NLRB*, 319 U.S. 533, 63 S.Ct. 1214, 87 L.Ed. 1568 (1943).

[2] The backpay award in this case is clearly not an abuse of the discretion that the Congress has given the Board in this area. In *NLRB v. Gullett Gin Company*, 340 U.S. 361, 71 S.Ct. 337, 95 L.Ed. 337 (1950), the Supreme Court held that the policies of the Act do not mandate that the Board allow the deduction of unemployment compensation benefits from backpay awards. The Court noted that "manifestly no consideration need be given to collateral benefits which employees may have received." 340 U.S. at 364, 71 S.Ct. at 339. In *NLRB v. East Texas Steel Castings Company*, 116 NLRB 1336, 1342 (1956), *enf'd*, 255 F.2d 284 (5th Cir.1958), we enforced a Board order that extended the *Gullett Gin* holding with respect to collateral benefits to "personal or domestic economies . . . resulting from the discrimination." 16 NLRB at 1342. Transportation expenses saved by virtue of not having to travel to work during a period for which backpay was later awarded were held to be personal or domestic economies of this type. Therefore, no deduction of these expenses from the backpay award was allowed.

The principles enunciated in *East Texas* govern the case at bar and we reaffirm them. For that reason, we find no merit in the respondents' contention that the Board *must* allow a deduction from a backpay award of any transportation, lodging, and food expenses saved by a discriminatee during the period covered by an award.

III.

The respondents next contend that the Board used inappropriate formulas in determining the amount of backpay that the respondents owed the four discriminatees. This

argument has two main prongs: first, that all four backpay awards are erroneous in that they are based on the hours worked in prior years by the individual discriminatees rather than on the hours worked by an average laborer in the hiring hall; and, second, that even assuming that the individual discriminatees' hours worked comprise the appropriate base, the Board's choice of years for comparison is arbitrary. Neither point has merit.

A.

[3] With respect to the Board's decision to use the hours of the individual discriminatees in past years rather than the hours of a hypothetical average employee, we need only say that the Board's choice of remedy was not arbitrary. *See NLRB v. Charley Toppino & Sons, Inc.*, 358 F.2d 94, 97 (5th Cir.1966). The Board chose to use the individual discriminatees' past hours because it determined that the average employee figure would be distorted by the existence of many pipeliners on the hiring hall roles who worked few hours on an annual basis. This determination clearly justifies the Board's choice of base hours in this case. That the Board has chosen to rely on the hours of an average employee in other cases or, indeed, that it might have chosen to do so in this case is simply irrelevant. *See Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977).

B.

[4] The respondents also challenge the Board's choice of particular base years with respect to the individual discriminatees. The respondents note that different base years were used for the various discriminatees, an approach that, they maintain, is impermissible. With respect to Stewart, the hours figure was taken from the year immediately preceding the discrimination against him, while Mitchell's hours figure was obtained from an average of his previous five years. As for Westmoreland and Cook, the Board utilized their hours figures from the second year preceding the

period in which they suffered discrimination rather than the figure from the immediately preceding year. In effect, the respondents argue, the Board used four distinct formulas to calculate backpay to the four discriminatees.

Once again, the respondents have misconceived our role as a reviewing court. With respect to every discriminatee, the Board had a rational basis for its choice of base years.[2] We therefore find no error.

IV.

The respondents also argue that the discriminatees failed to take reasonable steps to mitigate the backpay that would eventually be due them. This contention centers on two acts by the discriminatees: first, their failure to accept referrals from the Local's hiring hall, and, second, their failure to look diligently for work elsewhere.

A.

[5] The discriminatees' failure to accept hiring hall referrals from the Local provides no basis for reducing the backpay awards in this case. As the Board noted below, the respondents have already contested and lost on the issue of good faith referrals. In earlier proceedings in this case, the Board, with the approval of the District of Columbia Cir-

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[2]The figure utilized with respect to Stewart, the hours from the year immediately preceding the discrimination, is admittedly the most straight-forward. However, there was ample reason to depart from it with respect to the other discriminatees. Mitchell's average hours from the previous five years were used because of evidence that he had sustained a leg injury in the past; this approach was employed in order to avoid the distortion possible from the choice of a single year. The second year preceding the discrimination was used as a base for Westmoreland and Cook because the Board found evidence of "taint" from possible earlier discriminatory acts in the year immediately preceding the discriminatory acts that were actually adjudicated in this case. In every case, the Board arrived at a rational annual hours figure.

cuit, found that the referrals from the hiring hall had been discriminatory as to all four individuals. The respondents are now precluded from attempting to show that the discriminatees refused good faith referrals and thereby failed to mitigate the amount of backpay due.[3]

B.

[6] In order to determine if the discriminatees have taken reasonable steps to mitigate the backpay due them by seeking employment with entities other than the respondents, we must look at three of the discriminatees individually. For the reasons that follow, we find that these discriminatees took reasonable steps to mitigate.

With respect to Cook, the Board found that he had attempted to sell cars one year, although that effort was not financially successful. The following year, Cook earned only about one hundred dollars a quarter, the next two years he made nothing. However, low interim earnings alone do not demonstrate a failure to attempt to mitigate. Moreover, an attempt to assert wilfull loss of earnings in order to reduce a backpay award is an affirmative defense; the proponent of the defense bears the burden of persuasion. *NLRB v. Mooney Aircraft, Inc.*, 366 F.2d 809, 813 (5th Cir. 1966). Here, the respondents have simply failed to carry that burden in that they have failed to show that suitable employment was available for Cook.

The same reasoning applies to Westmoreland's situation. The Board noted that although Westmoreland's efforts to

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[3]The respondents attempt to avoid this preclusive effect by relying on footnote 6 in the Board's underlying decision, which states that "[w]hether Stewart or Mitchell mitigated their loss of pay or to what extent they were available to work is, of course, a matter that must be ascertained at the compliance stage of the proceeding." 247 N.L.R.B. at 1250 n. 6. The Board below read this language to leave open the question of possible employment with some entity other than the respondents. In view of the circumstances, that reading is the only reasonable one.

find work during the last three quarters of 1977 did not "involve a high degree of diligence, they do appear to pass the threshold of acceptability." *See NLRB v. Pilot Freight Carriers, Inc.*, 604 F.2d 375, 377 (5th Cir.1979). Indeed, during four months of that time, he was working on family automobiles, although there was evidence of some income from self-employment during the period. Westmoreland also testified that he had sought work during the period, and the Board chose to believe that testimony. Moreover, in 1978, Westmoreland located employment, albeit at a lower wage than he earned working for the respondents. On these facts, we cannot say that the respondents have proven a wilfull loss of earnings by Westmoreland.

The question of wilfull loss of earnings or failure to mitigate also arises with respect to Mitchell, and, again, no such wilfull loss has been shown by the respondents. It is true that Mitchell developed rather serious phlebitis and therefore limited his job search to an area within two hundred miles or so of his home. However, the respondents did not demonstrate that this restriction affected Mitchell's ability to find work. Moreover, although Mitchell did accept employment only to quit shortly thereafter, the employment was more strenuous than the trade that Mitchell had performed for the respondents. His quitting therefore does not have the effect of tolling backpay liability, as the respondents have failed to prove that he is either incapable or unwilling to perform his customary work. The Board chose to resolve all doubt against the wrong-doers in this case, and we uphold that choice.

V.

[7] Finally, the Board's order must be modified slightly with regard to the medical expenses incurred by the discriminatees during the backpay period. The parties stipulated that only medical expenses normally covered by the Health and Welfare Fund would be reimbursed as part of any backpay award. The General Counsel concedes that

nothing in the record supports a finding that the medical expenses involved were covered by the Plan. Accordingly, that portion of the Board's order is vacated, and in its place, the respondents are ordered to reimburse discriminatees for medical expenses that qualify under the Plan's rules and regulations.

VI.

We have considered all of the respondents' arguments and, with the exception of the medical reimbursement issue, find the arguments to be without merit. For that reason, the order of the Board is

ENFORCED AS MODIFIED.

APPENDIX B

No. 84-4035

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO; and Pipeline Local Union No. 38, Affiliated With the Laborers' International Union of North America, AFL-CIO,

Respondents.

JUDGMENT

Before: GARZA, REAVLEY and JOHNSON, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of its supplemental order dated October 26, 1983, against Respondents, Laborers' International Union of North America, AFL-CIO; and Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO, their officers, agents, and representatives. The Court heard argument of respective counsel on August 29, 1984, and has considered the brief and transcript of record filed in this cause. On December 17, 1984, the Court, being fully advised of the premises, handed down its decision granting enforcement of the Board's Supplemental Order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondents, Laborers' International Union of North Amer-

ica, AFL-CIO; and Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO, their officers, agents, and representatives, shall make the employees and benefit funds set forth whole by payment to each, as shown below, plus interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), less tax withholdings required by federal and state laws:

Respondent International:

	BACKPAY	WELFARE	PENSION
L. Alvin Stewart	$1,853.80	$228.07	$167.87
Tom Mitchell	2,626.86	132.00	96.00

Respondent Local 38: 1/

	BACKPAY	WELFARE	PENSION
M. Dale Cook:	$68,434.16	$2,790.46	$2,817.98
Tom Mitchell:	81,637.37	2,851.37	2,679.98
L. Alvin Stewart:	33,489.25	3,794.21	3,596.24
Mas Westmoreland:	34,936.43	2,466.84	2,367.86

IT IS FURTHER ORDERED AND ADJUDGED by the Court that Respondents, Laborers' International Union of North America, AFL-CIO; and Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO, their officers, agents, and representatives, shall reimburse M. Dale Cook, Tom Mitchell and Mac

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1/The figures shown below for Mitchell and Stewart include the amounts shown under the liability of Respondent International. Mitchell and Stewart, of course, are not entitled to a double payment and the actual collection procedure is a matter to be handled by the Compliance Officer of the General Counsel.

Westmoreland for medical expenses they incurred during the backpay period as listed below, but only to the extent that such medical expenses would have qualified for reimbursement absent the unlawful discrimination under the eligibility rules of the Respondents' Health and Welfare Fund:

Respondent International:	
Tom Mitchell	$496.20
Respondent Local 38:	
M. Dale Cook	$1,996.58
Tom Mitchell	1,440.60 2/
Mac Westmoreland	3,602.30

ENTERED:

2/The amount of medical expenses shown for Mitchell includes the amount shown under the International's liability. Since Mitchell is not entitled to double payment, the actual collection procedure will be handled by the Compliance Officer.

APPENDIX C

268 NLRB No. 18

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PIPELINE LOCAL UNION NO. 38, AFFILIATED WITH THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL — CIO (HANCOCK-NORTHWEST, J.V.)

and

MAC WESTMORELAND, an Individual

and

MILLARD DALE COOK, an Individual

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL — CIO; AND PIPELINE LOCAL UNION NO. 38, AFFILIATED WITH THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL — CIO

and

ALVIN STEWARD, an Individual

MILLARD DALE COOK, an Individual

and

TOM MITCHELL, an Individual

SUPPLEMENTAL DECISION AND ORDER

On 21 February 1980 the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding[1] finding, *inter alia*, that Respondent Local 38 violated Section 8(b)(2) of the Act by unlawfully causing the discharge of employee Mac Westmoreland and violated Section 8(b)(1)(A) of the Act by discriminatorily refusing

[1] 247 NLRB 1250.

to refer Local 38 members Millard Dale Cook, Tom Mitchell, Alvin Steward, and Westmoreland for work; and that Respondent Laborers' International Union, through the conduct of Local 38's business manager during its trusteeship over that Local, similarly violated Section 8(b)(1)(A) of the Act by refusing to refer Mitchell and Steward for work. The Board ordered that the discriminatees be made whole for any loss of earnings they suffered by reason of the discrimination practiced against them. On 13 November 1981 the United States Court of Appeals for the District of Columbia entered its judgment[2] enforcing the Board's Order.

A dispute having arisen over the amount of backpay due the discriminatees and pursuant to a backpay specification and appropriate notice issued by the Regional Director for Region 16, a hearing thereafter was held before Administrative Law Judge Richard J. Linton for the purpose of determining the amount of backpay due the discriminatees. On 10 June 1983 the Administrative Law Judge issued the attached Supplemental Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[3] and con-

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[2]*Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO, et al.* v. *N.L.R.B.*, 673 F.2d 552.

[3]Respondents have requested oral argument. Their request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

clusions of the Administrative Law Judge and to adopt his recommended Order.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Laborers' International Union of North America, AFL-CIO; and Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO, their officers, agents, and representatives, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. 26 October 1983

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

NATIONAL LABOR RELATIONS BOARD

[4]Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX D

STATUTORY PROVISIONS

29 USC 160(a)

The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .